WHEN IS A TRADE PRACTICE "UNREASONABLE"?

IN RE THE FENCING MATERIALS ASSOCIATION [1960] N.Z.L.R. 1121

The Trade Practices Act 1958 established a Trade Practices and Price Commission, the major function of which is to inquire into trade practices in New Zealand to determine whether or not they are contrary to the public interest and to make orders or take other steps as may be necessary to prohibit or modify any trade practice which it finds to be so. Appeals from the decision of the Commission are to be made to the Trade Practices Appeal Authority also established by the Act.

The first case brought on appeal before the Appeal Authority, Judge D.J.Dalglish, was In re the Fencing Materials Association [1960] N.Z.L.R. 1121.[1] The Wellington Fencing Materials Association was brought into existence during World War II to control the distribution of fencing wire. It has no constitution or rules but it elects an executive committee which meets periodically. With the removal of wire netting from the jurisdiction of the Price Tribunal in 1957 the Association resolved to endeavour to stabilize prices for wire neeting among its members. After negotiations between members a basis for uniform and retail price mark-ups was agreed upon. It was then"recommended" to members by means of a circular letter that mark-ups of 15 per cent on cost be adopted in fixing wholesale prices and 15 per cent on wholesale prices in fixing retail prices; and that the retail price for cut pieces should bear an additional 3d per yard.

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1. See comment in (1959) 35 N.Z.L.J. 337, and 353. Subsequent cases decided by the Authority have been; Re Registered Hairdressers (Inc.) [1961] N.Z.L.R. 161 (price-fixing arrangement contrary to the public interest in terms of s.20(d) of the Act - Commission directed to reconsider its order but appeal otherwise dismissed.) and Re Master Grocers' Federation [1961] N.Z.L.R. 171 (s.20(d)) again applied and the trade practice held to reduce or limit competition in the sale of groceries unreasonably; appeal allowed in part on a question of "jurisdiction".)

The Commission held that this arrangement[2] constituted a trade practice within the meaning of the Act and that it was contrary to the public interest. On appeal, the case was remitted to the Commission for reconsideration. Dalglish J. considered that the Commission had failed to consider "the extent to which competition is in fact reduced or limited by the agreement or arrangement which it has found to exist." (at 1133-1134). Nor had it considered whether that reduction or limitation of competition was "unreasonable" (a criterion which appears in s.20(a) to (d), although not in (c)). Further, there ought to have been consideration of what proportion of the total number of traders in the commodity was affected by the arrangement (1134). There was insufficient evidence both as to the membership of the Association and as to the number of traders who were not members.

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2. On the interpretation of "agreement or arrangement" as these words appear in s.19(2), (a) to (h) of the Act, see Dalglish J's remarks in the Fencing Materials Case at 1129, where the learned judge referred to the discussion of "arrangement" found in Robertson v. C.I.R. [1959] N.Z.L.R. 492, 501, and Newton v. Commissioner of Taxation of the Commonwealth of Australia, [1958] A.C. 450, 465 (per Lord Denning; [1958] 2 All.E,R,759, 763. Cf. the Registered Hairdressers Case, at 170-1 and the Master Grocers' Federation Case at 181. The position may perhaps be summarized as follows: "Arrangement" covers transactions however informal - (1) between two or more traders, binding themselves; (2) between individual traders and a third party; (3) something which is arranged by an organisation and which the members of the organisation are bound to observe. An agreement or arrangement need not be in writing but can be inferred from circumstances and/or from a course of conduct. It is not necessary to show a legally enforceable obligation or evidence of some compulsion in the event of a breach. It is not even necessary to prove that an executive body has the power to discipline a non-complying member. But the fact that the agreed list prices are actually charged is, by itself, insufficient to prove an "arrangement". See also Section 19 (7), (8) and (9) added by s.7 of the Trade Practices Amendment Act 1961. On the English conception of "agreement" of the 1956 Act s.6 and the Austin Motor Company's Case (1957) L.R. 1 R.P. 6.

This was the first time that the Appeal Authority had been called upon to exercise its jurisdiction and its decision involves a number of points of interest. This note however is principally concerned with the question of the public interest.[3]

The basic underlying premise of trade practices legislation is that greater competition in business will in the long run promote the public interest.[4] If it is satisfied that the continuance or repetition of any trade practice would be contrary to the public interest, the Commission is granted the power by s.19 to make various forms of order. Section 20 explains what "public interest" involves:

> 20. Trade practices deemed contrary to the public interest -
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> For the purpose of this Act, a trade practice shall be deemed contrary to the public interest only if, in the opinion of the Commission, the effect of the practice is or would be -
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> (a) To increase unreasonably the cost relating to the production, manufacture, transport, storage, or distribution of goods; or

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3. Professor Aikman has dealt with the problem of burden of proof raised by the interpretation of s.18: C.C.Aikman, "Some Developments in Administrative Law (1959), N.Z. Journal of Public Administration, March 1960, 52, 54-57. Dalglish J. deals with this question at length at 1124-1128, and see the Registered Hairdressers Case at 166. But the position has been altered by s.6 of the Trade Practices Amendment Act 1961, which amends s.18 of the principal Act and removes from the parties to a trade practice the initial onus of proving that the practice is not contrary to the public interest.
4. The Commission thought that "a general interpretation of the Act indicated that one basic intention of the legislation was to stimulate free competition and to restrain trade practices which tended to prevent competition", [1960] N.Z.L.R. 1121, at 1131. Dalglish J. agreed. "When consideration is given to the general scheme of the Act.... it is clear that one of the main objects of the Act is to secure and maintain free and open competition." (at 1132).

(b) To increase unreasonably the prices at which goods are sold; or

(c) To increase unreasonably the profits derived from the production, manufacture, distribution, transport, storage, or sale of goods; or

(d) To prevent or unreasonably reduce or limit competition in the production, manufacture, supply, transportation, storage, sale, or purchase of any goods, or

(e) To limit or prevent the supply of goods to consumers.

The agreement in question directly affected the prices charged to consumers, and in consequence imposed some limitation upon competition in the supply or sale of wire netting. The Commissioner of Trade Practices and Prices (as he was then described) therefore alleged that the agreement fell within the criteria established by s.20(d) of the Act, and as such should be adjudged contrary to the public interest. Against this it was contended that the restriction of competition was not unreasonable having regard to the extent of the agreement among wholesalers and retail firms handling wire netting; that the price margins fixed were reasonable in relation to the margins charged on comparable lines of other goods; and, thirdly, that as the supply of wire netting was at the time greatly restricted by import control, in the absence of the challenged agreement considerably higher prices could be charged by the firms concerned. The agreement was, on this approach, advantageous to the public since it served to maintain reasonably low and stable prices.

If this contention were accepted, the agreement in question, so far from leading to the detrimentally high prices envisaged as the possible result of a trade practice by s.20(b), had produced an opposite and beneficial effect.

The possibility immediately springs to mind that by virtue of one and the same agreement the public may suffer both detriment and benefit - in the short run the arrangement may be detrimental because the public have to pay higher prices for the commodity; but in the long run, the arrangement may prove very beneficial through its effects on the maintenance of price stability. The question therefore arises: can a Court,

interpreting and applying s.20(d), balance benefit against detriment anddeclare the "agreement or arrangement" against public interest if detriments outweigh benefits, and reach the opposite conclusion if they do not? In answering this question it may be helpful to look at an analogous doctrine to be found in the common law.

The common law doctrine of the public interest was largely developed in relation to contracts in restraint of trade. The old distinction between general and partial restraints was finally abandoned and replaced by the test: is this contract unreasonable as between the parties and as regards the public?[5]

In Mitchel v. Reynolds (1711) 1 P.Wms.181, the plaintiff sought to enforce a bond given for £50 not to carry on trade as a baker within a particular parish for five years. Lord Macclesfield set out clearly the advantages and disadvantages of restraints in general and of particular restraints, and upheld the bond after forming a conclusion as to where the balance lay.[6] It has been suggested that the ratio of this case was "widely misunderstood during the eighteenth and nineteenth centuries."[7] Be this as it may, Lord Macclesfield's reasoning was expressly approved by Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. [1894] A.C.535, at p.565. In the course of his speech, he said:

> The true view at the present time, I think, is this: The public have an interest in every person carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade in themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification,

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5. See, for the history of the Common Law, Wilberforce, Campbell and Elles, Restrictive Trade Practices and Monopolies (1957) 53 ff.
6. Cf. for a full discussion of Mitchel v. Reynolds, Wilberforce and ors, op.cit. (pp.55-58, para.206)
7. Idem 58.

> and, indeed, it is the only justification, if the restriction is reasonable ... reasonable that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[8]

That Lord Macnaghten's was the correct legal test was put beyond doubt by the House of Lords in Mason v. The Provident Clothing and Supply Co. [1913] A.C. 724, 733. It was further affirmed by Lord Parker of Waddington in Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Company Limited [1913] A.C. 781, 795, a decision of the Privy Council, in which a contract in restraint of trade, alleged to be contrary to ss.4 and 7 of the Australian Industries Preservation Act 1906, was upheld on the ground that there was insufficient evidence of injury to the public.

In all of these cases the benefits and detriments, or advantages and disadvantages, which arose from the restraint on trade, in respect to both the public and the parties to the agreement were balanced against each other. A similar task is assigned to the Court in the United Kingdom.[10]

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8. Lord Macnaghten's proposition could hardly be taken as the expression of the ratio decidendi of the House of Lords as a whole, since the House affirmed the decision of the Court of Appeal, and in particular the judgments of Bowen and Lindley, L.JJ. But these latter included variant propositions.
9. Cf. the analogous test adopted by Att-Gen.v. Terry (1874) L.R. 9 Ch.423 (H.L.). (Municipal Corporations empowered by Act of Parliament to remove obstructions.) Jessel M.R. (at 428) conceived of circumstances in which there "would be a public benefit that would counterbalance the public injury."
10. One of the most influential decisions of the Restrictive Practices Court has been the Yarn Spinners' Case (1959) L.R. 1. R.P.118[1959] 1 W.R.L.1954; [1959] 1 All.E.R.299. It has been followed, for instances, in the most recent agreement to be brought before that court (at time of writing):- In re Linoleum Manufacturers' Association [1961] 1 W.L.R. 986.

Section 21 of the Restrictive Trade Practices Act 1956 provides:-

> "(1) For the purposes of any proceedings before the Court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say ...
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> (b) That the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom ... and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction." (Emphasis added).

This section was discussed and applied by Devlin J. (as he then was) speaking for the Restrictive Practices Court in Re Chemists' Federation's Agreement, (No.2) (1958) L.R. 1 R.P. 75; [1958] 1 W.L.R. 1192. The challenged restriction there was to the effect that proprietary medicines should be sold to the public only through shops employing a qualified pharmacist. Four specific benefits to the public were alleged by the Federation to result from the agreement, in terms of s.21(1)(b). The Court asked itself whether these were of substantial benefit to the public, and its conclusion was that: "The federation has, therefore, failed to satisfy us that a restriction which confines to chemists - the right to sell medicines is justifiable in accordance with s.21." (at 462).

Again, in In re Yarn Spinners' Agreement (1959) L.R. 1 R.P. 118; [1959] 1 W.L.R. 154; [1959] 1 All.E.R.299, the Court balanced the benefit of price stability against the detriment

to the public of the sacrifice of a free market.[11]

It is interesting to compare the approach of the United Kingdom Monopolies Commission,[12] which has proceeded in a similar manner. In its investigation of the supply and export of pneumatic tyres the advantages and disadvantages of the price-fixing arrangements involved were considered. It was said: "These considerations appear to us to outweigh any convenience to the trade in arranging price changes and any gain in stability of prices that may be attributable to the price discussion. We therefore conclude that the price discussions are and may be expected to be on balance against the public interest."[13] (Emphasis added).

In New Zealand, the Trade Practices and Prices Commission and the Appeal Authority must both apply the Act first

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11. See particularly [1959] 1 W.L.R. at 169-170. Devlin J., says, for instance: "We cannot find that in the circumstances of this case stabilising the price of yarn confers any benefit on the purchasing public that is not outweighed by the loss of the chance of reductions in price that might be secured under free competition." (ibid.) Cf. also the approach adopted at 175 where Devlin J., having listed the detriments to the public, goes on: "Against these detriments we have found two sets of circumstances to be balanced ..." With this, cf. also the Black Bolt Case (mentioned in some detail later in this note) [1960] 1 W.L.R. 884, at 908, 910. The furtherance of the "national interest" may be a further objective to be weighed in the balance - according to Re Water-Tube Boilermakers Agreement (1959) L.R. 1 R.P. 285, at 341. See comment in (1960) 23 M.L.R. 83-4.
12. As to the jurisdiction exercised by each tribunal, see Yamey, "Restrictive Agreements and the Public Interest: A critique of the Legislation," (1960) 23 M.L.R. 477, 499-502, Rostow, "Restraints of Competition", (1960), Public Law 152, 157; Wilberforce and Ors. op. cit., 426-427; G.V.Rodgers, "Comparative Aspects of Restrictive Trade Practices" (1961), 3-4, 13-15.
13. Monopolies Commission, Report on the Supply and Export of Pneumatic Tyres, (1955), 113, set out in extenso in Wilberforce and Ors., op. cit., 463.

of all[14] and ignore all the anologies - whether Common Law, 1956 Act or Monopolies Commission - if they are rendered nugatory by the words of the New Zealand Act. The main thesis of this note is, however, that there is no such inconsistency. The second main submission here advanced is that no serious attempt was made by Dalglish J. to balance advantages against disadvantages to the public in the Fencing Materials' Case.

The five effects which make a practice contrary to the public interest are expressed by s.20 as alternatives. Dalglish J. therefore concluded (at 1132) that "when the Commission has to consider whether or not any particular trade practice is contrary to the public interest under s.20 it may apply each of the tests in the section separately. A trade practice may therefore be deemed to be contrary to the public interest if only one of these tests is satisfied. The separate paras. (b) and (d) ... are ... alternative; they are not in any sense cumulative."

It is difficult to quarrel with the learned judge's interpretation of the Act: but it is submitted that the result is unrealistic in present day conditions. If, for example, a trade agreement were entered into by producers fixing a profit margin at a minimal level of say 1 per cent, and in the circumstances this was appreciably lower than the profit margin charged before on the same goods or comparable categories of goods, such an agreement might still be invalidated under s.20(d) as contrary to the public interest because of the limitation imposed on competition. Similarly, an agreement to restrict production in an important industry experiencing difficult trading conditions, (such as coal in New Zealand or cotton in the United Kingdom at the present time) in the interests of preventing over-supply and maintaining a stable level of employment, could also be invalidated as contrary to the public interest in terms of the same paragraph. Further, on the basis of the test adopted, the benefit to the public of full employment in particular areas could not be balanced against the detriment of a relatively slightly higher level of prices operating in the country as a whole.

The defect is not one of interpretation, but lies in the drafting of the Act itself. It is instructive to compare the United States and United Kingdom positions. In the United States restrictive trade practices and monopolies in particular are subject to legal control under the Sherman anti-trust

14. Cp. Re Chemists' Federation's Agreement (No.2) (1958) L.R.1 R.P. 75, 103, per Devlin J.

legislation. The Sherman Act itself was passed in 1890. To prove that a price-fixing agreement is contrary to the public interest it is enough to show restriction of competition. Restrictive trade practices are illegal per se.

"The Sherman Act contains only two brief substantive provisions. It condemns as criminal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations. And equally, it condemns monopolisation, or attempts or conspiracies to monopolise any part of that trade or commerce."[15]

In the United Kingdom, the position is different again: it is based on the "abuse" principle rather than the "prohibition" principle. Section 21 of the Restrictive Trade Practices Act 1956 (U.K.) states seven grounds, any of which if made out will justify the continued existence of a restrictive trade practice. Under this Act it is possible that the agreement in the Fencing Materials case, if the Association's contentions could have been proved, might have been upheld as not contrary to the public interest in that:

> "(b) the removal of the restriction would deny to the public as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such."

In the United Kingdom, then, it is recognised that there may be good and bad restrictive practices and only the latter are illegal. Korah explains the difference in approach between the two countries: "In this country, throughout the history of contracts in restraint of trade, we have been far

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15. Rostow, op. cit. 482-3. A general discussion follows of the judicial interpretation of the Sherman Act, especially the Standard Oil Case (1911) 211 U.S.1. The test there adopted (per Rostow at p.486) was: Does the restraint, viewed in its market setting, constitute a quantitatively significant limitation on competition. If it does, it is illegal as an "undue", and therefore an "unreasonable" restraint of trade. Cf. Yamey op.cit., at p.152, and the quotation in note 1 thereof from Dewey, Monopoly in Economics and Law (1959), p.166.

more concerned with the rise in prices which so often follows the emergence of a monopoly. It is not the power itself which we wish to prevent, but its use to the detriment of the consumer, whether it results in higher prices, lower quality or decreased services."[16]

Up to this point in the discussion, however, we have not considered the possible impact of the word "unreasonably" which appears in s.20(d) - and, indeed, in (a), (b) and (c). In the Fencing Materials Case, Dalglish J. considered that this word had primary reference to the extent of reduction or limitation of competition - and to nothing else. He stated(at 1134):- "This [sc. the word "unreasonably"] involves, it seems to me, a consideration in the present case of what proportion of the total number of traders in the commodity are affected by the agreement or arrangement and perhaps also what proportion of the total trade in the commodity is handled by the traders so affected." As already stated, the Appeal Authority found that the Commission did not have sufficient evidence on this point before it to reach a conclusion and the matter was referred back for reconsideration.

But might not "unreasonably" have been differently interpreted? One cannot resist the criticism that by the use of this word the Legislature has abrogated its function. If a Tribunal is to strike down certain trade agreements, there should be a clear directive as to the criteria to be employed. The word "unreasonably" obscures the standards which the Court must apply - at the most vital point![17] The concept of "reasonable care" gives welcome flexibility to the tort of negligence, but flexibility at the kernel of a Statute initiating a new economic policy which is to be accomplished

16. Valentine Latham Korah, "The Restrictive Practices Court", (1959) C.L.P. 76. This valuable article deals principally with the economic aspects of restrictive trade practices.
17. Another vague word used in the Act is the word "substantially" which appears in s.19 (2). Here, however, the position is different, for the use of this word enables a flexibility of approach to the problems of jurisdiction to make an order: it is therefore welcome, even if it has caused some difficulty by its association with the word "only" in s.19(2) (c). See Dalglish J. in the Registered Hairdressers' Case [1961] N.Z.L.R. 161, at 186-7.

through a Tribunal is most unwelcome.

Yet, having deplored the need for any interpretation of such a key word at all, one can still logically argue for a different interpretation from that accepted by Dalglish J. in the Fencing Materials Case. Might "unreasonable" not mean: "having regard to, and weighing both advantages and disadvantages to the public" from the reduction or limitation to competition involved? On this basis, the Court's function would be to weigh all the arguments and see whether, everything considered, the reduction or limitation under s.20(d) (and so on, mutatis mutandis for (a), (b) and (c)) worked in favour of, or against, the public's interests. If this interpretation is accepted, the difference between the English and the New Zealand positions would simply be that whereas in England the balancing of benefit against detriment has been written into the legislation, in New Zealand the Tribunal's role has been left to be inferred from the use of the word "unreasonably". A further consequence would be that Dalglish J's observations on the logical independence of the separate paragraphs of s.20 would be formally correct but of no practical significance. For a Court dealing with an argument based on s.20(d) would not be entitled to apply simultaneously (a), (b) or (c). But in practice, considerations of price (i.e. (b)) would become relevant since the way in which price had been affected would be one of the factors relevant to the "reasonableness" of the proposed reduction or limitation of competition (i.e. (d)). Dalglish J. has, however, subsequently said (in the Registered Hairdressers' Case [1961] N.Z.L.R. 161, at 174):- "As the legislature has provided in para.(b) of s.20 for the case of an unreasonable increase in price it cannot be the intention of the Legislature that the reasonableness or otherwise of the prices fixed under the price fixing agreement or arrangement is to be the test for the purposes of para.(d) of the reasonableness or unreasonableness of the reduction or limitation of competition."[18]

This last proposition is undeniable: unreasonable increase in prices could not be the test - but it could be one of the factors to be taken into account. The remarks in the Registered Hairdressers' Case do not, therefore,

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18. This reasoning was repeated in Re Master Grocers Federation [1961] N.Z.L.R. 171, at 189.

force us to abandon the present suggestion. That proposition should, however, be qualified to avoid misunderstanding.

The attitude of the State in New Zealand with regard to monopoly cannot be completely negative for the State itself owns and controls several trading monopolies. These are not subject to the jurisdiction of the Trade Practices and Price Commission nor on principle need they be because they price their services having regard to the general interests of the public-at-large. Those interests are sometimes best served by a restriction of prices. Why should not a price-restriction policy agreed upon by several private firms similarly promote the public's interest - regarding the whole thing from a long-term point of view? One danger of the Fencing Materials interpretation of "unreasonableness" is, therefore, that it may compel the Commission on the Appeal Authority to take a narrow and myopic view of economic causes and probable effects.

A one-sided test of the public interest similar to that applied in the United States is not suitable to New Zealand conditions for general economic reasons. The same may be said, it is submitted, of a list of one-sided tests. The New Zealand economy is a dependent one and subject to wide "balance of payments" fluctuations. Import, price and other administrative controls have been necessary, especially in the post-war period, with a frequency and on a scale virtually unknown in the United Sates and the United Kingdom. In these circumstances an unyielding dogma that "free" competition is always necessary to promote the public interest seems inappropriate. The Trade Practices Act 1958 was designed to operate in what may be termed conditions of "normal" supply and demand. When these circumstances do not exist, e.g. when supply shortages result from import control, the basic premise of the Act in favour of free competition is no longer applicable for such "freedom" may lead to price increases and the exploitation of the consumer. At such a time there must be recognition of the possible beneficial efforts of an agreement which in ordinary circumstances would operate to restrict free competition and trade. The benefits and the detriments to the public might then be balanced with particular regard to the prevailing economic climate of the day.

It has been submitted that this could indeed be accomplished by the adoption of a liberal interpretation of "unreasonably". If this interpretation is not declared by

the Court of Appeal[19] to be the correct one in the near future, it is submitted that there should be a further amendment to the legislation to make the position clear.

There may be circumstances or conditions in which a trade practice could be upheld, as being of benefit to the public interest, and other circumstances in which the same agreement would be deemed contrary to the public interest. That this is not a purely theoretical possibility has been shown by the decision of the Restrictive Practices Court in Re The Black Bolt and Nut Association's Agreement, (1960) L.R. 2 R.P. 50; [1960] 1 W.L.R. 884; [1960] 3 All E.R. 122. The Court - composed of Diplock J. and four lay members, considered an agreement between the manufacturers of about 90 per cent of the black bolts and nuts made in Britain. Prices were fixed by a price list but special quantity discounts were given to large buyers and to Government departments. The Court held that the agreement except for the special disoount provisions was not contrary to the public interest, but the discounts were of no benefit to the public and must therefore be abandoned. It was decided that the prices fixed by the agreement were reasonable on the ground that they gave no more than a reasonable return on turnover or capital. Uniform prices were held to constitute a specific and substantial benefit to the public.

The importance of the case for present purposes is that Diplock J. pointed out that if prices were fixed in future which were unreasonable the Registrar of Restrictive Practices might apply again to the Court under s.22 of the 1956 Act for a further order.[20]

This situation was envisaged by Dalglish J. in the Fencing Materials Case (at 1132): "Conditions may change from time to time and, indeed, in the present case while the current effect of the trade practice in question may be to tend to keep the price of wire netting down (during a period of shortage of supplies), it is quite clear that the immediate effect of the arrangement when it was made was to increase the mark-up, following the termination of price-fixing under the Control of Prices Act 1947 (at a time when it was anticipated that there would be no shortage of supplies)."

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19. Cases may be stated for the opinion of the Court of Appeal under s.38 of the Act.
20. [1960] 1 W.L.R. 911.

The difficulty that could arise in such circumstances where the beneficial effects of an agreement at a particular time were recognised and the agreement upheld is that a later reference by the Registrar to the Commission might be met by the plea of res judicata. This assumes, as it is submitted that one must, that the Restrictive Practices Court in England and the Trade Practices and Prices Commission and Appeal Authority in New Zealand are exercising judicial, as opposed to legislative or administrative functions.

If leave to either Registrar or the representatives of the industry in question to re-apply to the Commission were reserved, the difficulty could not of course arise.[21] But what would be the theoretical position if leave were not reserved? To counter the plea of res judicata it would apparently be necessary to plead that new evidence had been discovered since the earlier hearing. For example, it might be argued that the prices fixed by the agreement challenged in the earlier hearing had now changed; or that restrictions on conditions of supply had subsequently been lifted.

Whether the discovery of fresh evidence is an answer to a defence of res judicata is not very clear.[22] The leading English cases are Phosphate Sewage Co. v. Molleson (1879) 4 A.C. 801, and Re Scott and Alvarez's Contract, Scott v. Alvarez [1895] 1 Ch.596, and in New Zealand, Kennedy v. Jones (1887) 6 N.Z.L.R. 81 (C.A.), the principles stated in which were approved by the Court of Appeal in Smith v. Gleeson, (1892) 10 N.Z.L.R. 733, and Orbell v. Mossman [1927] N.Z.L.R. 353. But these are all clearly distinguishable in the circumstances likely to arise in a Trade Practices re-hearing in that in all of these cases the "fresh" evidence discovered was in existence before the date of, though not adduced at,

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21. There seems no authority for this - probably because the contrary proposition would be virtually unarguable? When a party is given leave to re-apply to the Court this is usually because it would be difficult to draw up a satisfactory final order without such a power being reserved. On the exercise of the power, the substantive "rights" of the parties would not be reinvestigated. So the Trade Practices position is also different in this respect for Diplock J's grant of such power seems to involve just that.
22. Cf. Code of Civil Procedure, R.276 (e).

the original hearing. No case in New Zealand or the United Kingdom has been discovered in which fresh evidence was admitted where the evidence was of facts or events which had arisen or taken place after the first hearing and which, if they could have been then foreseen, would have affected the judgment of the court. It is not, therefore, possible to give a clear and confident answer on the res judicata point. The position may be that, since the Registrar's (in New Zealand, the Examiner's[23]) ability to apply to the Commission for an investigation is in no way restricted by the language of the statute, no plea of res judicata would be possible. On proper notice being given, "Any order made by the Commission may at any time be amended or revoked by a subsequent order"; Section 8(2) as substituted by the Trade Practices Amendment Act 1961, s.7.

The interpretation of the 1958 Trade Practices Act presents many difficulties. It would be foolish to complain that an essentially economic policy decision is left to a Tribunal, the Trade Practices and Prices Commission, which in many ways resembles a court of law.[24] For this is a solution which facilitates investigations by the Commission in a way which is fair to all parties. In particular, the Commission's procedure, which it was left to work out for itself, is a modified version of the procedure of a Court of Justice - the same is true in the United Kingdom. Criticism at this point would be foolish, for it would involve doubting the wisdom of Tribunals dealing with economic problems generally and to attack the United States' and United Kingdom's solutions as well as our own. But it is legitimate to criticise the failure of Parliament to provide clear and workable criteria for its new instrument to use. And in this respect the reproach may be levelled at the New Zealand Parliament alone; a clear indication of the tests that the Restrictive Practices Court must apply is afforded by s.21 of the United Kingdom Act. In New Zealand, on the other hand, the use of the word

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23. "Examiner" is substituted for "Commissioner" by the Trade Practices Amendment Act 1961, s.2.
24. On the question of the "Justiciability" of Restrictive Practices, cf. Marshall, "Justiciability" in Oxford Essays in Jurisprudence (1960) 265, at 283 and penetrating comments by Yamey, "Comparative Aspects of Restrictive Trade Practices", 23-5.

"unreasonably" renders the whole meaning of s.20 of our Act obscure. As this note has endeavoured to show, more than one interpretation is possible. The danger is that if Dalglish J's perfectly sensible interpretation is allowed to stand, the application of the Act will in practice preclude consideration of highly relevant economic consequences and the desirable weighing of those consequences one against the other.

[NOTE: The above note is the joint work of Mr. M.A.Pickering who prepared his last draft in September 1960, and myself. In revising that draft I have made substantial additions and amendments which, for reasons of time, were not referred back to Mr. Pickering, who is currently a post-graduate student at the University of London. I therefore assume full responsibility for the contents of the note as it now appears.

D.L.M.*]

* D.L.Mathieson, B.A. LL.B. (N.Z.), B.C.L. (Oxford) Senior Lecturer in the Department of Jurisprudence and Constitutional Law.